

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

## BEYOND COMMERCE, INC.,

2:10-CV-1568 JCM (LRL)

Plaintiff,

V.

SICHENZIA ROSS FRIEDMAN  
FERENCE LLP, et al.,

### Defendants.

## ORDER

Presently before the court is defendants Sichenzia, Ross, Friedman, Ferernce, LLC and Darren M. Occasio's (collectively "SRFF") motions to dismiss dated September 21, 2010 (doc. #4), and October 20, 2010 (doc. #11). Plaintiff, Beyond Commerce, Inc. ("BC"), timely filed oppositions (docs. #9 and #14), and SRFF filed replies (docs. #10 and #15).

On October 6, 2010, BC amended its original complaint (doc. #8) whereby plaintiff abandoned its breach of contract claim and opted to proceed with a sole claim for breach of fiduciary duty. SRFF requests dismissal due to improper venue pursuant to Federal Rule of Civil Procedure 2(b)(3) or, alternatively, for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). With respect to improper venue, SRFF asserts that a forum selection clause, contained in the retainer agreement governing the parties' relationship, requires this action be brought exclusively in New York County, New York.

In support of this assertion, SRFF points to the broad language of the forum selection clause contained in the retainer agreement, which extends to “any action hereunder . . .” (doc. #11, Exhibit

1 C). Moreover, SRFF asserts that because it is not possible to litigate BC's tort claim (breach of  
 2 fiduciary duty) without implicating and interpreting the retainer agreement contract, it is necessary  
 3 to apply the contract to BC's claim for breach of fiduciary duty. With regard to personal jurisdiction,  
 4 defendants claim that they lack both the "systematic and continuous" contacts necessary to establish  
 5 general personal jurisdiction as well as the requisite "minimum contacts" necessary to establish  
 6 specific personal jurisdiction in Nevada.

7 Conversely, BC asserts that the forum selection clause at issue is invalid because it (1) is  
 8 inapplicable to tort claims; (2) fails to comport with Nevada law; and (3) is *per se* invalid due to  
 9 inconspicuousness. Lastly, BC argues that this court has both general and specific personal  
 10 jurisdiction over SRFF.

11 **A. Improper venue**

12 Under the Federal Rules of Civil Procedure, a defendant may rely on improper venue as a  
 13 valid defenses to a plaintiff's claim. FED. R. CIV. P. 12(b)(3). And improper venue is the correct  
 14 procedural vehicle for enforcing a forum selection clause. *R.A. Argueta v. Banco Mexicano*, 87 F.3d  
 15 320, 324 (9th Cir. 1996). "Whether a forum selection clause applies to tort claims depends on  
 16 whether resolution of the claims relates to interpretation of the contract." *Manetti-Farrow, Inc. v.*  
 17 *Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988).

18 Here, as in *Manetti-Farrow*, the forum selection clause is applicable to BC's tort claim for  
 19 two reasons. First, the language of the forum selection clause herein is broader than the clause in  
 20 *Manetti-Farrow*. Specifically, the forum selection clause herein encompasses "any suit, action,  
 21 proceeding or judgment relating to or arising out of this [a]greement" (doc. #11, Exhibit E at 16) as  
 22 opposed to the language in *Manetti-Farrow* which only applied to "interpretation" or "fulfillment" of  
 23 the contract. Second, BC's breach of fiduciary duty claim—like the tort claims in *Manetti-*  
*Farrow*—must necessarily involve the retainer agreement contract between the parties to assess what  
 25 duties SRFF actually owed BC. As a result, BC's tort claim is directly related to the contract that  
 26 contained the forum selection clause and must be dismissed by this court under Fed. R. Civ. P.  
 27 12(b)(2) for improper venue.

28

1       1. The Scope of the Forum Selection Clause Under Nevada Law

2           BC offers two additional reasons why venue is proper; however, both arguments are  
 3 misplaced. First, BC claims that the forum selection clause is not applicable because it does not  
 4 comport with the requirements of Nevada law. But the Ninth Circuit has made clear that in diversity  
 5 cases, federal law—not state law—governs the analysis of the effect and scope of forum selection  
 6 clauses. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 497 (9th Cir. 2000); *see also, Manetti-*  
*Farrow, Inc.*, 858 F.2d at 513 (applying federal law to the forum selection clause therein).  
 7 Accordingly, BC’s reliance on state law herein is not proper and its argument fails.

8       2. Conspicuousness

9           Second, BC claims that the forum selection clause is *per se* invalid because of its  
 10 inconspicuous nature. To this end, BC properly cites Nevada law in support of its contention *see*  
 11 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 297-98 (9th Cir. 2000) (relying on California  
 12 Business and Professional Code § 20040.5 to invalidate a forum selection clause) and relies  
 13 primarily on the Nevada Supreme Court case *Tandy Computer Leasing v. Terina’s Pizza*, 105 Nev.  
 14 841, 844, 784 P.2d 7, 8 (Nev. 1989) (*per curiam*) to support its contention.

15           In *Tandy*, the Nevada Supreme Court concluded that a forum selection clause included within  
 16 a consumer lease agreement, which was entered into between owners of a pizza restaurant and Tandy  
 17 computers, was unenforceable because the manner in which it was negotiated failed to satisfy basic  
 18 requirements of due process. *Tandy*, 105 Nev. at 844, 784 P.2d at 8. Specifically, the forum  
 19 selection clause did not form part of the bargain as neither Tandy’s agent nor representatives of lessee  
 20 knew it existed. *Id.* at 842, 784 P.2d at 7. Nevertheless, the *Tandy* Court recognized that had the  
 21 forum selection provision been obtained through ‘freely negotiated’ agreements, it would not have  
 22 been ‘unreasonable and unjust,’ and its enforcement would not have “offend [d]ue [p]rocess.” *Id.*  
 23 at 843, 784 P.2d at 8 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

24           Additionally, the *Tandy* Court refused to enforce a forum selection clause between the parties  
 25 because the provision was “buried” on the very bottom of the back page of the lease agreement, in  
 26 small print, and located in a paragraph labeled “MISCELLANEOUS.” *Id.* at 843, 784 P.2d at 8.

1       Here, no evidence suggests that the forum selection clause contained in the retainer  
2 agreement was not freely negotiated between the parties. Instead BC solicited SRFF's assistance in  
3 representing the company with respect to certain Securities and Exchange Commission reporting  
4 requirements and BC voluntarily signed the retainer agreement in exchange for SRFF's services.  
5 Unlike *in Tandy*, the parties herein are sophisticated entities. Moreover, BC signed and was aware  
6 of the retainer agreement contract. Finally, the forum selection clause herein appeared in the same  
7 size and style of font as the rest of the clauses in the contract. Thus, *Tandy* is distinguishable from  
8 the facts herein because the forum selection clause herein is both conspicuous and freely negotiated.

## 9 || B. Personal Jurisdiction

Because dismissal is proper under Fed. R. Civ. P. 12(b)(3), this court need not determine whether it has personal jurisdiction over SRFF.

12 || Accordingly,

13 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED defendant SRFF's motions  
14 to dismiss (doc. #4 and #11) be, and the same hereby, are GRANTED.

IT IS FURTHER ORDERED that *Beyond Commerce, Inc. v. Sichenzia Ross Friedman Ferencce, LLC* (2:10-cv-1568-JCM-LRL) be, and the same hereby is, DISMISSED.

17 DATED February 10, 2011.

Xenia C. Mahan  
**UNITED STATES DISTRICT JUDGE**